SUPREME COURT, U. S.
FILED
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 73-276

NORMAN A. LANDRY,
Petitioner

v.

HEMPHILL, NOYES & CO.,
WALTER WINCHESTER,
PHILIP J. MURPHY,
Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

PETITIONER'S MOTION FOR LEAVE TO FILE SUPPLEMENTAL MEMORANDUM AND SUPPLEMENTAL MEMORANDUM # 1

Norman A. Landry
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Pro se for Petitioner

PETITIONER'S MOTION FOR LEAVE TO FILE SUPPLEMENTAL MEMORANDUM

Petitioner respectfully request this Court to grant petitioner's motion for leave to file supplemental memorandum.

Petitioner's reason for this motion is that petitioner is pro se and as a result of further research, petitioner wishes to have this material deemed a part of the petition for certiorari.

Norman A. Landry

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Pro se for Petitioner

SUPPLEMENTAL MEMORANDUM

Even though the District Court refused leave to amend the pleadings, before the trial (A. 9, 139 to 150, 212d, 10)*, there was an expressed consent of the parties for the trial of issues not raised in the pleadings (Tr. 463-4) (A. 215 to 227)(Tr. 1047 to 1059, 1061-2).

The case was tried by expressed consent of the parties on the theory of liability for fraudulent and deceitful practices perpetrated by the defendants upon the plaintiff in violation of Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 promulgated thereunder (A. 226, 217).

Defendant Murphy testified to securities transactions that he effected in plaintiff's account and was receiving commissions on said transactions when he was not a registered representative all with the approval of defendants Winchester and Hemphill Noyes (Tr. 903-4) (Pet. 58 to 60).

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* Record references in this memorandum are as follows:
A.- Appendix to pleadings, etc.
Tr.- Trial Transcripts filed with Appendix
Pl. Ex.- Plaintiff's Exhibits as contained in seperate bound volumes
Pet.- The instant petition for certiorari

Plaintiff testified (Tr. 84) that defendant Murphy never indicated to him that he wasn't a registered representative.

The evidence, at the trial, indicated that the transactions effected by defendant Murphy when he was not a registered representative resulted in a loss in plaintiff's account.

The monthly statement, Plaintiff's Exhibit 4-H, indicates that on Aug. 24, 1962 there was a purchase of 200 shares of Chadbourn Gotham in the amount of 1,377.50 and the monthly statement, Plaintiff's Exhibit 6-K1 indicates that on June 1, 1964 there was a sale of 200 shares of Chadbourn Gotham in the amount of 506.28 when the account was liquidated (Tr. 339).

Defendant Murphy testified (Tr. 903-4) that he made the purchase in plaintiff's account described above when he was not a registered representative and that his number (Tr. 940, 957) appears on the confirmation slips for transactions which liquidated plaintiff's account.

Plaintiff testified (Tr. 84-5-6) using monthly statement (Pl. Ex. 4-H) where defendant Murphy had made a purchase of 200 shares of Chadbourne-Gotham in plaintiff's account indicated on monthly statement as August 24, 1962.

Plaintiff testified (Tr. 90-1), using chalk (Pl. Ex. 11-A) where Chadbourne-Gotham was purchased and sold and how the loss was computed (Tr. 147).

Plaintiff's Chalk Exhibit 11-C, Item number 123, the Loss column indicated a Loss of 871.22 as a result of the transactions in Chadbourne-Gotham.

The plaintiff (Tr. 172-3, 376-7) (emphasis added) showed to the Court and the jury a monrhlt statement, Exhibit number 5-Pl, where an actual loss stemming from a transaction was shown in the amount of 4,667.11 and plaintiff indicated to the Court and jury the figure of 4,667.11 which appeared in Loss column of Plaintiff's Chalk Exhibit 11-B.

Plaintiff testified (Tr. 375) that Plaintiff's Chalk Exhibit (Pl. Ex. 11-A, B & C) was an exact replica of how the transactions were effected in the monthly statements (Pl. Ex. 4-A through 6-M) and that the losses (Tr. 368) that appeared in the Loss column of Plaintiff's Chalk Exhibit were reflected on plaintiff's monthly statement.

The plaintiff testified (Tr. 149), that the monthly statements indicated a loss of approximately $96,000.

Plaintiff's Chalk Exhibit 11-C, the last column of said Exhibit, was a column entitled, Loss, which indicated a total loss of 96,196.33.

Plaintiff's witness, Mr. Thomas J. Staiti, Certified Public Accountant (Tr. 511) was prevented (Tr. 520) from testifying to total losses sustained by the plaintiff in his account and there was an offer of proof (Tr. 582, 588-9) made on behalf of the plaintiff, that Mr. Staiti would have testified to in regards to loss in plaintiff's account and Plaintiff's Exhibit 42 was marked for Identification.

Plaintiff's Exhibit 42 which was marked for Identification, indicates, among other matters, a figure in the column marked, Losses, an amount of $96,196.33.

The defendants (Tr. 720-1), objected to the Loss column on Plaintiff's Chalk Exhibit 11-A, 11-B, and 11-C and the District Court (Tr. 721-2) ordered said Loss column be removed and marked for Identification. This matter is now before this Court (Pet. 11, Question 7).

Someone had tampered with Pl. Ex. 11-B, the Loss column which had been marked for Identification, as someone had neatly cut off a section from the bottom of Pl. Ex. 11-B which had been marked for Identification, which contained the figure of 4,667.11 (See Petitioner's Reply Brief, Page 19).

The District Court (Tr. 1049-1050, 1054), refused to submit to the jury a seperate claim form or seperate claim with respect to a general allegation that there were fraudulent practices perpetrated by the defendants against the plaintiff prohibited by Section 10(b). This matter is now before this Court (Pet.72-3).

The Court of Aopeals was in error (Pet. 101-2) when it stated that plaintiff made only one complaint in April, 1963.

Plaintiff testified (Tr. 257, 265, 360), that he complained about two weeks after he got out of the hospital in June or July of 1963 and again through a letter of complaint on May 18, 1964 (Tr. 339-340) (A. 179).

There was a preponderance of evidence that plaintiff's account was churned by the defendants for no justifiable reason other than to profit the defendants.

Defendant Winchester testified (Tr. 601-2), that from 1957 to 1962 there were five to six transactions in plaintiff's account.

There was uncontroverted testimony by the plaintiff (Tr. 146) that from January of 1962 to the end of May 1964 the total transactions amounted to one million two hundred thousand or one million two hundred and ten thousand.

Defendant Murphy was effecting secu-

and receiving commissions when defendant Murphy was not a registered representative, with the approval of defendant Winchester & defendant Hemphill, Noyes & Co. (Pet. 58-59-60).

Transactions effected in plaintiff's account, by defendant Murphy when defendant Murphy was not a registered representative, resulted in losses in plaintiff's account. (See Page 2 and 3 of this memorandum)

As a result of defendant Murphy effecting transactions in plaintiff's account when he was not a registered representative, resulted in defendants violating Rules of New York Stock Exchange, violating Agreement on all confirmation slips (Tr. 713) and violating Section 10(b) of the Securities Exchange Act and Rule 10b-5 promulgated thereunder.

There was testimony, at the trial, by Mr. Joseph Shwartz, from the United States Securities and Exchange Commission of numerous over extentions of credit by the defendant Hemphill, Noyes & Co. to plaintiff.

Securities transactions would not have taken place in plaintiff's account had the defendants scrupulously observed the Federal securities laws and New York Stock Exchange Rules.

Plaintiff testified (Tr. 146) that he had never been simultaneously long and short in his account prior to meeting Mr. Murphy.

Plaintiff testified, that defendant Murphy stated to him that the reason why he would make a purchase of the same security in plaintiff's account, that plaintiff was short in, was to protect the plaintiff's account (Tr. 267, 113, 129, 346). Plaintiff testified (Tr. 267) that this was beyond him and that (Tr. 131) the account was so complex and he didn't understand it, and (Tr. 141) that he really didn't comprehend it, but accepted what Murphy told him, because plaintiff was not familiar with how those things worked out.

Plaintiff testified (Tr. 266-7) that there was a short sale of Chrysler in plaintiff's account and that defendant Murphy informed the plaintiff that he had purchased Chrysler in plaintiff's account, that it was necessary to protect plaintiff's account, which made plaintiff's account long and short in Chrysler and that Murphy sold Chrysler the day after he bought it because Murphy stated Chrysler started to turn down and that it didn't require an uptick, plaintiff testified that this was beyond him at the time. Defendant Murphy purchased Chrysler for $13,466.38 and sold it the following day for $12,995.35.

Plaintiff testified (Tr. 104) that he had no conversation with Murphy prior to these transactions, plaintiff was in the hospital.

Petitioner testified (Tr. 367-8), under cross examination, that the sale of Chrysler was handled like a regular long sale and should have been a short sale, which required margin, and that the deposit was not made and it was executed improperly because a short sale requires what is called an uptick and the broker has got to mark the slip that he turns in that goes to New York either as a long sale or a short sale. It is a violation if he marks a sale long---(Defendants attorney interupted plaintiff before he could finish the sentence).

Mr. Joseph Shwartz, from the United States Securities and Exchange Commission testified (Tr. 458-9), that the violation in Chrysler came when the broker treated the transaction as a long sale when the broker should have treated it as a short sale.

The manner in which the defendants were effecting securities transactions in plaintiff's account was in violation of the Securities and Exchange Commission Rule 10a-1 and also the defendants perpetrated a fraud on the plaintiff in violation of Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 promulgated thereunder (For Rule 10a-1 see Pet. 134-5) (See also U.S. v. Peltz, 433 F.2d 48 (2nd Cir.,1970), cert. den. 401 U.S. 955)

Plaintiff testified (Tr. 135, 339-340) that after a letter of complaint was sent out to defendant brokerage firm, defendant brokerage firm liquidated plaintiff's entire account and plaintiff received nothing. Defendant Murphy testified that he received the complaint (Tr. 978)(A. 279).

Plaintiff testified (Tr. 141) that some of the securities that he brought in to defendant Murphy in Nov. 1962 (Tr. 89-90) plaintiff had owned for five to six years (Pl. Ex. 4-Ml) and that the securities that he didn't bring in, plaintiff still has these securities.

Plaintiff testified (Tr. 57, 136), that after defendant Hemphill, Noyes & Co. liquidated his account, plaintiff immediately made an in depth study of all of the rules and regulations and went to the New York Stock Exchange and to the Securities and Exchange Commission.

In the case of Hecht v. Harris, Upham & Co. 283 F.Supp. 419, the Court stated, "Churning cannot be established by precise rule or formula, and essential question of fact for determination is whether volume and frequency of transactions, considered in light of nature of account and situation and needs and objectives of customer, have been so excessive as to indicate purpose of broker to derive profit for himself while disregarding interest of customer".

In the case of Hecht v. Harris, Upham & Co., C.A.Cal. 1970, 430 F.2d 1202 (9th Cir. 1970), the Court stated, "Where a single fraudulent scheme based on excessive churning of customer's account involved both securitiea and commodities, court was entitled to award damages for entire loss".

The District Court (Tr. 1061) refused to instruct the jury on plaintiff's requested instructions in regards to churning (Pet. 42-3), which instructions would have had the effect of making defendants liable jointly and severally to the same extent (A. 217) and said instructions would have been in conformity with Section 20(a) of the Securities Exchange Act of 1934 (Pet. 132).

The District Court stated (Tr. 1061) that said instructions talk in terms of really a directed verdict.

The District Court should have rendered a directed verdict or after the trial entered a judgement notwithstanding the verdict for plaintiff (Pet. 16(a), Question 26) for commissions and damages as a result of defendants willful flagrant violation of Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 promulgated thereunder.

The plaintiff's brief to the Court of Appeals, requested the Court to order the District Court to enter a judgement notwithstanding the verdict in favor of the plaintiff.

In the case of Hecht v. Harris, Upham & Co. 283 F.Supp. 420 the Court stated, "Evidence in action by customer against brokerage firm and its commodities manager for damages for alleged violations of Securities Acts established that defendant firm did not maintain reasonably adequate system of internal supervision and control, that it did not enforce with any reasonable diligence such system as it did maintain, and that brokerage firm did not act in good faith but, on the contrary, indirectly induced, participated in, approved and accepted benefits of excessive trading of plaintiff's account by firm's commodities manager. Securities Exchange Act of 1934 § 20(a), 15 U.S.C.A. § 78t(a)".

The jury found by a preponderance of evidence that the defendants were guilty of churning plaintiff's account. The District Court granted defendants motion for judgement notwithstanding the verdict not because the account was not churned in violation of the Federal securities laws but because the Court (A 250d) had reservations as to whether the defendants should be held liable jointly and severally for the amount of $6,500. (Pet. 14, Question 19)

As a RESULT of the District Court order (TR. 1142) Mr Stahl testified to Losses (TR. 577-578) That do not appear on the Monthly Statements) (See also TR. 522-523) mal

On the last day of the trial, plaintiff's trial attorneys filed a motion to withdraw and the District Court stated that inasmuch as counsel have a lien in this case, the motion was filed until further notice (Tr. 1165).

The following day, plaintiff's trial counsel sent a letter to plaintiff informing plaintiff that they had a lien against the judgement and that they would not file for a new trial or take an appeal on behalf of the plaintiff.

Although the District Court did not allow plaintiff's trial attorneys to withdraw, plaintiff's trial attorneys refused to represent plaintiff during the critical ten day period following the trial. The District Court was informed of this matter.

Nobody informed plaintiff of his rights.

This Court has not yet acted upon my Petition for a Writ of Certiorari. NAL

Respectfully submitted,

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